DATE ISSUED: December 30, 1994

CASE NO: 94-STA-24

In the Matter of

MICHAEL BRYANT,

Complainant,

v.

HELENA TRUCK LINES, INC.,

Respondent.

APPEARANCES:

Michael Bryant, *Pro se*
3819 St. Route 588
Gallipolis, Ohio 45631
For the complainant

Chris J. North, Esquire
Vorys, Sater, Seymour & Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 (the Act) and the regulations promulgated thereunder, 29 C.F.R. Part 1978.

Complainant, Michael Bryant, filed a complaint with the Secretary of Labor on April 5, 1993 alleging that Bob Evans Transportation (Bob Evans) discriminated against him in violation of Section 405 of the Act. The Secretary, acting through his duly authorized agents, investigated the complaint and determined that there was no reasonable cause to believe that Bob Evans violated Section 405. The Secretary's findings were issued on December 13, 1993. (ALJX 1).

On March 4, 1994, Mr. Bryant mailed his appeal opposing the findings of the Secretary. On April 26, 1994, respondent filed a motion to dismiss on the grounds Mr. Bryant failed to timely file his objections and a request for a hearing. I conducted a formal hearing on May 26, 1994 at Gallipolis, Ohio, at which time the parties were afforded the opportunity to present both documentary and testimonial evidence on all of the issues. Since the parties formally waived the procedural time constraints, the record was left open until July 25, 1994 for the filing of simultaneous original briefs. By an order dated July 11, 1994, the evidentiary record in this case was closed and I extended the date for filing the briefs to August 8, 1994. The findings of fact and conclusions of law as set forth in this decision are based on a thorough review of the evidentiary record and consideration of the written arguments of the parties.[1]

ISSUES

1. whether the appeal filed in this case is timely;

2. whether the complainant was discharged in violation of Section 405 of the Act; and,

3. whether the complainant's termination was due to his involvement in an activity protected by the Act.

FINDINGS OF FACT

Bob Evans Transportation (Bob Evans), engages in interstate trucking operations on a commercial basis. It maintains an office and terminal in Bidwell, Ohio. Seventeen truckdrivers and two mechanics are employed at Bidwell to cover the routes run by nine trucks and ten trailers in Ohio, Texas, Virginia, Maryland, Pennsylvania and West Virginia. (Tr. 98). Respondent's transportation manager at this location is James Denney. His responsibilities include completing personnel records relating to such matters as taxes, drug testing and previous experience of the truckdrivers. Denney also must verify the drivers' commercial licenses, check for previous traffic violations and insure that all necessary examinations are conducted, such as a physical exam, road test and written driver's test. It also is his responsibility to explain the safety policies to the drivers and distribute the company's safety manual and the Federal Motor Carrier Safety Regulations Pocketbook. (Tr. 99-101).

Mr. Bryant began his employment as a full-time truckdriver with Bob Evans in August of 1988. Complainant's regular route was the east coast run, a two-day round trip

[1]References in this decision to ALJX, CX and RX pertain to the exhibits of the administrative law judge, complainant and respondent. The transcript of the hearing is cited as Tr. and by page number. Surnames sometimes will be used for purposes of convenience.

from Bidwell to Laurel, Maryland. His regular driving partner was Charles Camden. (Tr. 105-106).

Denney scheduled Sherman "Mike" Kirby to work with complainant during the first week of April, 1993 while Camden was on vacation. (Tr. 105-106). Complainant called the dispatcher's office on Monday morning, April 5, 1993, to ask with whom he was going to work on the east coast run later that day. Denney informed the complainant that Kirby would accompany him. Complainant told Denney that he refused to drive with Kirby. (Tr. 45-46, 106). Bryant previously had complained about Kirby's driving ability after working with him. (Tr. 102-103). Denney therefore sent Kirby on the east coast run with Michael Saxon, who had been scheduled to work in maintenance. (Tr. 106).

Later in the morning on that same date, Bryant came to Denney's office. Denney told the complainant that Bryant would still have a job with Bob Evans if he would work the east coast run with Kirby on Wednesday. Bryant also was told that he could drive the mountainous portion of the route if he was concerned about Kirby's driving ability. Complainant replied that driving under such an arrangement would "break up" his Department of Transportation driving logs. Denney did not understand this concern since neither Bryant nor Kirby would have to drive over ten hours on the run. Bryant then requested the week off, which Denney refused. (Tr. 106-108).

Complainant returned to Denney's office later that afternoon insisting that he had been fired. Denney again explained that Bryant could back to work if he would take the scheduled run on Wednesday. Bryant threatened to "mop the floor" with Denney, then apparently left. (Tr. 108-109).

Denney scheduled Kirby and Saxon to take the east coast run on April 7, but would not allow them to leave until after it was time for Bryant to report to work. Complainant did not report to work on that date but he did come in later to get some of his personal belongings. Bryant told Denney that he had been fired and that he wanted his paycheck, profit sharing and anything else to which he was entitled because of the termination. Denney told the complainant that he had not been fired yet and that he could still work if he took the east coast run on Friday with either Kirby or another part-time driver named Jenkins. Bryant replied that he would not work with either Kirby or Jenkins. (Tr. 109-111).

Bryant neither reported for work nor telephoned Denney on Friday, April 9. Saxon and Kirby again took the east coast run after waiting for the complainant. Bryant was terminated on Saturday, April 10, 1993, for refusing available work. (Tr. 111; CX 2).

Kirby was hired by Bob Evans in March of 1992. Previously, he had been a truckdriver for Swift Transport. He has experience driving in the mountains. No driver, other than Bryant, has ever refused to drive or run with Kirby. (Tr. 63, 65, 66-67).

Denney personally administered the road test for Kirby, driving from Bidwell to Xenia, Ohio and back. (Tr. 99-100; RX 5). His assessment was that Kirby did exceptionally well for a young driver. (Tr. 101). Kirby had never received a traffic citation at the time he was hired by Bob Evans and had never been involved in an accident. (RX 3).

Bryant first worked and rode with Kirby in May of 1992. He thought Kirby was not a good or safe driver apparently because Kirby experienced some trouble shifting gears and driving the truck through the mountains. However, the complainant worked with Kirby on

six consecutive days in that month and they drove a total of 3,300 miles. Kirby neither was involved in an accident nor received any traffic citations while driving with Bryant. (Tr. 30, 44).

Saxon has been a truck driver for 22 years. It is his opinion that Kirby is a safe driver. He experienced no problems with Kirby's driving while working with him in April of 1993. (Tr. 91).

Ron Burnett, another truckdriver for Bob Evans with considerable experience, has worked with Kirby. He believes Kirby to be an unsafe driver during icy conditions. He also experienced one incident in which he believed Kirby was driving too fast while approaching an accident scene. (Tr. 18-28).

Larry Kingery, a mechanic for Bob Evans, was present on April 7, 1993 when Denney assured the complainant that he was not fired. Kingery has heard Bryant and Burnett complain about Kirby's driving ability. However, he has not heard any other drivers complain about Kirby. Kingery believes Kirby to be an excellent driver although his riding with Kirby has only been on short runs of a few miles between the shop and Bob Evans plant. (Tr. 80-84).

Bryant filed a complaint with the U.S. Department of Labor on April 5, 1993 regarding his termination by Bob Evans. The complaint was investigated and the Department of Labor determined in the Secretary's findings dated December 13, 1993 that there was no reasonable cause to believe that Bob Evans violated the Act in terminating the complainant. (ALJX 1). Mrs. Bryant telephoned personnel of the Department of Labor to inquire about the findings. She was told the findings were sent by certified mail and were not "picked up" by Bryant. Mrs. Bryant requested another copy of the findings which were received on February 5, 1994. (Tr. 55-56). Mrs. Bryant again telephoned personnel of the Department of Labor regarding the appeal period and she was told that the 30-day time limit for the appealing of the findings would start from the time Bryant actually received the findings. (Tr. 56; ALJX 7). Bryant filed his appeal of those findings on March 4, 1994. (Tr. 55, 56; ALJX 1, 7).

CONCLUSIONS OF LAW

Timeliness of Appeal

Section 405 of the Act allows any aggrieved party to file objections to the findings with the Department of Labor within 30 days. The respondent argues that on January 12, 1994, 30 days after the Secretary issued his findings, complainant had filed no objection and therefore the findings became final. Counsel notes that complainant's appeal was mailed on March 4, 1994, which is 81 days after the Secretary issued his findings and 51 days after the dismissal of the complaint was final.

Respondent, in its memorandum in support of its motion to dismiss, stresses that the Act's stated time restrictions provide adequate opportunity to request a hearing following notification of the findings of the Secretary. Counsel points out the Fifth Circuit's view on these time limitations by quoting:

> We are not unmindful of the need for the expeditious consideration and disposition of complaints filed under STAA and the hardship the employer or employee may suffer when the proceedings are unnecessarily delayed. We are

> also aware that the Supreme Court has expressed concern about the inordinate amount of time involved in STAA actions.

Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1067 (5th Cir. 1991)(citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 270-71 (1987)(Brennan, J., dissenting)(describing time restrictions as "overly generous")).

Complainant did not receive the Secretary's findings until February 5, 1994. Mrs. Bryant credibly testified at the hearing that she contacted the Department of Labor regarding this matter and was assured that the time period for the filing of an appeal did not commence until the Secretary's findings were received. Bryant filed his appeal on March 4, 1994, which was within 30 days of the receipt of the findings.

The regulations pertaining to the filing of an appeal of the Secretary's findings under the Act provide that the appeal is to be filed "[w]ithin thirty days of the receipt of the findings." 29 C.F.R. § 1978.105. Since Bryant received the findings of the Secretary on February 5, 1994 and filed his appeal within thirty days of that date, I find that his appeal should be considered timely. Assuming *arguendo* that Bryant's appeal did not meet the strict time requirements of the Act, I believe the facts of this case justify a finding of equitable modification because Bryant diligently pursued his appeal rights and the respondent has suffered no prejudice from the delay. *See Spearman v. Rodeway Express, Inc.*, Case No. 92-STA-1 (Sec'y Dec. August 5, 1992). Therefore, I shall consider the merits of the complainant's appeal.

Section 405

This case arises under the Service Transportation Assistance Act as Michael Bryant was employed as an over-the-road truckdriver from 1988 to 1993 by Bob Evans which was engaged in the operation of the commercial motor vehicles in interstate commerce to transport cargo. 49 U.S.C. § 2301(2)(A). Mr. Bryant alleges in his complaint that he was fired by Bob Evans for refusing to team with an inexperienced driver. Therefore, the complaint falls within Section 405(b) of the Act which provides:

> No person shall discharge, discipline, or in any manner discriminate against an employee with respect to an employee's compensation, terms, conditions, or privileges of employment for refusing to operate a motor vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or to the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health, resulting from the unsafe condition. In order to qualify for the protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305(b).

Section 405 was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations. Section 405 protects employee "whistle-blowers" by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards. 49 U.S.C. App. §§ 2305(a)(b). *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994).

An employee establishes a *prima facie* case of a Section 405 violation by proving three elements: (1) that his employment engages him in protected activity; (2) that his employer took adverse employment action against him; and (3) that a "causal link" exists between his protected activity and the employer's adverse action. *Yellow Freight System, Inc. v. Reich*, 27 F.3d. 1133; *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987); *McGavock v. Elbar, Inc.*, 86-STA-5 (Sec'y July 9, 1986); *Moyer v. Yellow Freight Systems, Inc.*, 89-STA-7 (Sec'y November 21, 1989), *aff'd in part and rev'd on other grounds, sub. nom., Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992), *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). If the complainant satisfies this requirement, then the evidentiary burden shifts to the employer to prove that the employee was discharged for a legitimate non-discriminatory reason. The evidence produced by the employer to rebut the presumption of discrimination only has to raise a genuine issue of fact as to whether discrimination actually occurred; it does not have to prove at this stage that it was actually motivated to fire a complainant because of the proffered reason. *Burdine*, 450 U.S. at 454, 455. The complainant must then prove that the employer's explanation for terminating his employment is not the "true reason."

The Supreme Court has stated that Section 405 of the STAA "protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). However, the instant case does not involve a question pertaining to the condition of a motor vehicle. Indeed, it involves a claimant who refused to drive with another driver whom he felt to be unsafe based on past experience. That experience did not involve an accident, any damage to the truck, or a traffic citation. Bryant merely alleged that Kirby was an unsafe driver and refused to drive with him. His refusal to drive with Kirby is not based on objective evidence regarding Kirby's driving ability, as Kirby has passed all the necessary tests for the operation of a truck, and has an excellent driving record. I again stress that Bryant made no allegation of safety problems with the truck.

Bryant's refusal to run with Kirby was not because it would have violated an applicable Federal rule, regulation, standard or order, or because he reasonably feared serious injury due to an unsafe condition of the truck equipment. Furthermore, there was no unsafe condition which Bryant asked Bob Evans to correct. I find that asking to ride with a driver other than Kirby does not qualify as a request for the remedying of an unsafe condition, because Kirby is not an unsafe condition. Bryant's concerns in his refusal to drive with Kirby therefore are not specifically protected by regulation, rule, standard or order, and they

are unrelated to the safety of the equipment. Thus, his action of refusing to drive with Kirby does not qualify as protected activity.

The "because" clause of Section 405(b) involves a reasonableness standard. The Act offers protection only if a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury or serious impairment of health resulting from the unsafe condition. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2nd Cir. 1994). In this case, a reasonable person would not conclude that there is a bona fide danger of a harmful result simply by teaming with another driver who has an excellent driving record. Kirby met all federal safety requirements for the operation of a truck, and he has sufficient training and experience. I find that Bryant's refusal to ride with him was not reasonable under the circumstances and therefore is not protected.

I also find that Denney was not encouraging Bryant to violate any rules or regulations regarding the operation of the truck when he suggested Bryant drive the mountainous portion of the trip. He was not asking Bryant to drive longer than allowed or to drive while fatigued. It is true that Section 392.3 of the Federal Motor Carrier Safety Regulations protects a driver who may unexpectedly encounter fatigue on the course of a journey. *Yellow Freight System, Inc. v. Reich*, 8 F.3d 980, 988 (4th Cir. 1993). 49 C.F.R. § 392.3. However, the evidence in this case does not show that Bryant was asked to drive under such conditions or longer than allowed under the Department off Transportation regulations. *See* 49 C.F.R. § 395.3.

I finally note that I believe that Bob Evans should be allowed deference in its internal scheduling decisions. It was up to Bob Evans, through Denney, to decide whether or not to accommodate Bryant's request to ride with a driver other than Kirby. I cannot dictate respondent's internal procedures where they do not conflict with Federal regulations. The Act reflects the need for a balance between public safety and the needs of transportation employers. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2nd Cir. 1994). In this case, Bob Evans' need to run its business did not interfere with public safety. Moreover, the respondent afforded Bryant several chances to resume his work before terminating him, yet he chose to ignore those opportunities.

I find that Bob Evans' decision to terminate Mr. Bryant's employment was based on legitimate reasons unrelated to retaliation for his exercise of a protected activity. Therefore, Bryant has failed to establish a *prima facie* case under the Act.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the complaint of Michael Bryant under the Surface Transportation Assistance Act is dismissed.

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DONALD W. MOSSER
Administrative Law Judge